RECORD
AND
BRIEFS

No. 11-338, 11-347

In the
Supreme Court of the United States

DOUG DECKER, in His Official Capacity as Oregon State Forester, *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*, *Respondents*.

GEORGIA-PACIFIC WEST, INC., *et al.*, *Petitioners*,
v.
NORTHWEST ENVIRONMENTAL DEFENSE CENTER., *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, *et al.*, IN SUPPORT OF PETITIONERS

M. REED HOPPER
Counsel of Record
DAMIEN M. SCHIFF
DANIEL A. HIMEBAUGH
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: mrh@pacificlegal.org
E-mail: dms@pacificlegal.org
E-mail: dah@pacificlegal.org

Counsel for Amici Curiae
[Additional amici listed on inside cover]

ALABAMA FORESTRY ASSOCIATION, AMERICAN LOGGERS COUNCIL, ASSOCIATED LOGGING CONTRACTORS-IDAHO, ASSOCIATED OREGON LOGGERS, BUCKEYE CONSERVANCY, CALIFORNIA FORESTRY ASSOCIATION, FOREST LANDOWNERS ASSOCIATION, KENTUCKY FOREST INDUSTRIES ASSOCIATION, MISSOURI FOREST PRODUCTS ASSOCIATION, NORTH CAROLINA FORESTRY ASSOCIATION, NORTHERN ARIZONA LOGGERS ASSOCIATION, OHIO FORESTRY ASSOCIATION, OREGON WOMEN IN TIMBER, SOUTHEASTERN LUMBER MANUFACTURERS ASSOCIATION, TEXAS FORESTRY ASSOCIATION, TREATED WOOD COUNCIL, VIRGINIA FOREST PRODUCTS ASSOCIATION, AND WASHINGTON CONTRACT LOGGERS ASSOCIATION.

QUESTIONS PRESENTED

(1) Congress has authorized citizens dissatisfied with the Environmental Protection Agency's (EPA's) rules implementing the Clean Water Act's (CWA's) National Pollution Discharge Elimination System (NPDES) permitting program to seek judicial review of those rules in the Courts of Appeals. *See* 33 U.S.C. § 1369(b). Congress further specified that those rules cannot be challenged in any civil or criminal enforcement proceeding. Consistent with the terms of the statute, multiple circuit courts have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding.

Did the Ninth Circuit err when, in conflict with those circuits, it held that a citizen may bypass judicial review of an NPDES permitting rule under 33 U.S.C. § 1369, and may instead challenge the validity of the rule in a citizen suit to enforce the CWA?

(2) In 33 U.S.C. § 1342(p), Congress required NPDES permits for stormwater discharges "associated with industrial activity," and delegated to EPA the responsibility to determine what activities qualified as "industrial" for purposes of the permitting program. EPA determined that stormwater from logging roads and other specified silvicultural activities is non-industrial stormwater that does not require an NPDES permit. *See* 40 C.F.R. § 122.26(b)(14).

Did the Ninth Circuit err when it held that stormwater from logging roads is industrial stormwater under the CWA and EPA's rules, even though EPA has determined that it is not industrial stormwater?

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IDENTITY AND INTEREST OF AMICI CURIAE

The Amici respectfully submit this brief in support of Petitioners Oregon State Forester Doug Decker, *et al.*, 11-338, and Georgia-Pacific West, Inc., *et al.*, 11-347 (consolidated).[1]

The Amici organizations represent forest land owners, wood producers, conservationists, educators, and other interested groups from around the country. Many of the Amici are involved in developing, using, or maintaining forest roads.

Pacific Legal Foundation was founded almost 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and a reasonable and balanced approach to environmental regulation. PLF attorneys acted as lead counsel in the

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[1] In accordance with Supreme Court Rule 37, all parties have been notified of the Amici's intent to participate in this case and all parties have consented to the filing of this brief. Acknowledgments of consent have been filed with the Clerk of the Court.

Additionally, pursuant to Supreme Court Rule 37.6, the Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici, their members, or their counsel have made a monetary contribution to the brief's preparation or submission.

Clean Water Act cases *Sackett v. EPA*, 132 S. Ct. 1367 (2012), and *Rapanos v. United States*, 547 U.S. 715 (2006). PLF attorneys also participated as amicus in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009), and *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). PLF has experience with the issues raised in this case, having participated as amicus in the proceedings below. *Nw. Envtl. Def. Ctr. v. Brown*, Case No. 07-35266 (9th Cir. May 17, 2011) (Dkt. 67, 98).

The Alabama Forestry Association was organized in 1949 to promote good stewardship of renewable forest resources for the benefit of the nation. The Association pursues this goal through public outreach, safety training, industry communications, legislative advocacy, and policy development. The Association has more than 1,800 dues-paying members, including landowners, foresters, trucking companies, and wood product producers. The Association represents Alabama's largest industry that supports over 400,000 forest land owners with an estimated $15 billion in products from over 650 producers.

The American Loggers Council was formed in 1994 to serve as a national voice for professional loggers. The Council is made up of a coalition of regional and state logging associations and councils, represents more than 50,000 employees, and reaches over 10,000 logging contractors. Through networking and outreach, the Council seeks to enhance the logging profession and further sustainable forestry practices.

Associated Logging Contractors-Idaho is a trade organization of logging contractors. It currently has close to 400 logging contractor businesses as members and an additional 100 associate members who are

affiliated with the timber industry and logging contractors. Its member companies are small, family-owned, or closely held businesses that operate on the forest lands of Idaho. Many are multi-generational businesses with close ties to the land and their communities. The Idaho forest industry makes up 4.6% of the total labor income in the state and produces $2 billion in annual sales of primary wood and paper products. The forest industry is an essential component of school funding in rural areas where unemployment exceeds 20%.

Associated Oregon Loggers represents approximately 1,000 contract logging companies and businesses associated with the logging industry in the State of Oregon. Its members are primarily small, family-owned businesses, many of which are owned and managed by second, third, and even fourth generations of loggers. Members rely on a long-established transportation system (including forest roads) to move logs and other forest products from the woods to processing mills and other destinations.

The Buckeye Conservancy is an organization of family farm, ranch, and forest landowners and resource managers in the North Coast region of California. The Conservancy is dedicated to the promotion, communication, and implementation of those ideals and policies that support the ecological and economic sustainability of natural resources and open space in family ownership.

The California Forestry Association is a nonprofit, nonpartisan organization dedicated to sustainable uses of renewable resources and responsible forestry. Association membership includes forest land owners, forestry professionals, loggers, manufacturers,

wholesalers, and retailers who are engaged in the production and distribution of wood products. These members own 3.8 million of the 7.4 million acres of private forest land in California and are committed to protecting and enhancing the natural life cycle of California's forests. They also supply wood resources by contracting to purchase and harvest significant amounts of timber from public lands, including the national forests.

The Forest Landowners Association was established in 1941 to provide its members with education, information, and national grassroots advocacy, which enables them to sustain their forest lands across generations. Association members own and operate more than 40 million acres of forest land in 48 states. Through outreach on behalf of private forest land owners nationwide, the Association seeks to enhance forest land management and stewardship. The Association also provides advice, support, and information to policymakers, educating them on how proposed legislation could affect private forest management, stewardship, and owners' rights.

The Kentucky Forest Industries Association was organized in 1965 to promote the economic welfare and interests of Kentucky's wood industry by advocating conservation and sustainable forest use, and by working with agencies to promote the forest industry. The Association has a wide range of members (approximately 600) including landowners, sawmills, loggers, flooring companies, insurance companies, financial institutions, heavy equipment companies, and numerous other support industries. Association members directly employ over 20,000 people with a large impact on Kentucky's economy.

The Missouri Forest Products Association was established in 1970 to encourage the wise use and conservation of the nation's resources through education and issue advocacy. The Association has over 300 members, comprised primarily of wood processing mills and logging businesses. Association members contribute more than $4 billion directly to the economy with between $10-$12 billion in induced benefits.

The North Carolina Forestry Association was organized in 1911. The Association actively promotes healthy, productive forests by supporting the efforts of forest land owners and forestry-related businesses that responsibly manage or use forests and produce wood and paper products. The Association is primarily engaged in legislative and regulatory advocacy, environmental education, logger training, and public outreach. The Association has approximately 4,000 members, including forest land owners, forest managers, wood suppliers and loggers, and producers of wood and paper products. Forest products is North Carolina's largest manufacturing industry, providing over 68,000 jobs with an annual economic impact of $23 billion affecting more than 180,000 jobs. Forest lands in North Carolina cover more than 18 million acres (59% of the state).

The Northern Arizona Loggers Association was formed in 1975 to promote forest industry professionalism, knowledge, and safety, primarily through training and education. The Association has numerous members made up of logging contractors and suppliers. Most are family-owned businesses vital to local rural economies. The Association reports that a proposed 750,000-acre forest restoration project could

be undermined if NPDES permits are required for the estimated 2,000 miles of related forest roads.

The Ohio Forestry Association was founded in 1903 and became a trade association in 2008. The Association's mission is to support the management of Ohio's forest resources and improvement of business conditions for the benefit of forestry-related industries and enterprises, including the hardwood industry, logging companies, sawmills, pulp and paper mills, hardwood brokers, equipment sellers, consulting companies, foresters, and landowners. To that end, the Association engages in policy and legislative advocacy, education, and outreach. The Association manages the Ohio Master Logging Company Certification Program, which is an outgrowth of Ohio's response to dealing with pollution. The Association works closely with state and local agencies to deal with voluntary compliance mechanisms and all participants believe the current approach is addressing Ohio's needs. A 2005 report by the Ohio Division of Forestry and Ohio State University showed that Ohio's wood and fiber industry contributed $15.1 billion to Ohio's economy and employed 119,000 people with a payroll of $4 billion.

Oregon Women in Timber was organized in 1979 to create awareness and appreciation for the value of trees, and to encourage understanding about protection, management, and conservation of renewable forest resources. These goals are furthered through education programs in schools that provide instruction on ecology, forest management practices, and the use of wood products. Members consist of women associated with loggers, foresters, landowners, and others who are concerned about forest

management. Oregon Women in Timber is an active participant in Oregon Women for Agriculture and American Agri-Women.

The Southeastern Lumber Manufacturers Association is a trade organization established in 1962 to promote family-owned lumber businesses. The Association represents lumber manufacturers in 17 states, primarily in the South. With emphasis on government affairs, marketing and management, and operational issues, the Association offers programs to support independent lumber manufacturers.

The Texas Forestry Association was founded in 1914 to enhance and perpetuate Texas forest resources through tree planting, education, training, and political action. The Association has approximately 2,855 members, which include private landowners, professional loggers, consulting foresters, and processing mills. In East Texas alone, forest lands are 94% privately owned and cover more than 12 million acres. Forestry is a major industry in Texas.

The Treated Wood Council was established in 2003 to serve all segments of the treated wood industry in government affairs. The current membership is approximately 500 and includes wood product suppliers, wood preservative suppliers, wood treaters, and related organizations throughout the country. Member businesses have a $4.5 billion impact on the national economy and supply approximately 15,000 direct jobs.

The Virginia Forest Products Association was founded in 1958 to support and advance Virginia's lumber and wood products industry through public education and legislative and regulatory advocacy.

The Association has more than 200 members, primarily small businesses, and represents those who produce lumber and wood products in the Commonwealth of Virginia, as well as those companies that provide goods and services to these producers. Association members produce the majority of the lumber and wood products manufactured in Virginia. Virginia's forest industry ranks as one of the commonwealth's largest manufacturing sectors. A recent study by the Weldon Cooper Center found that Virginia forests provide more than $27.5 billion in annual benefits.

Washington Contract Loggers Association is a trade association that represents over 700 logging companies in Washington State. Association members either own forest land, log for small forest land owners, or purchase standing timber from private or public landowners. The use of forest roads is vital to the logging industry in the State of Washington.

The Amici oppose the expansion of federal permitting for forest road runoff that the Ninth Circuit's opinion will bring about if it is affirmed. Because of their experience and informed perspective on the issues, the Amici believe that this brief will aid the Court in deciding this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Northwest Environmental Defense Center (NEDC) wants the federal government to impose expansive new permitting requirements on millions of forest land owners and timber harvesters across the country by making forest road runoff a point source pollutant under the Clean Water Act's National

Pollution Discharge Elimination System (NPDES). The Court should not grant NEDC's wish. The "Silviculture Rule" lists activities that are exempt from NPDES permitting, including "*non-point source* silvicultural activities such as . . . surface drainage, or road construction and maintenance from which there is natural runoff."[2] 40 C.F.R. § 122.27(b)(1) (emphasis added). The Silviculture Rule codifies, as applied to forest roads, the Clean Water Act's regulatory distinction between point source discharges, which are generally subject to NPDES permitting; and non-point source discharges, which are exempt. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12); *see also Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004); *League of Wilderness Defenders / Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) (defining "non-point source pollution" as "the type of pollution that arises from many dispersed activities over large areas"). Until the Ninth Circuit's decision below, it was understood that runoff from forest roads was non-point source in character and therefore exempt from NPDES permitting under the Silviculture Rule.

If the Court requires EPA to begin administering NPDES permits for forest road runoff, it will displace long-established state water quality programs, upset

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[2] The other activities listed in the Silviculture Rule, which are subject to NPDES permitting, but which are not at issue in this case, are deemed "silvicultural point sources," and are "any discernable, confined and discrete conveyance[s] related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States." 40 C.F.R. § 122.27(b)(1).

current federal permitting practices, and imperil timber harvesting operations throughout the United States. But none of this is necessary because any pollution created by forest road runoff is already being addressed through state best management practices. The Amici respectfully urge this Court to reverse the Ninth Circuit's decision and hold that forest road runoff is exempt from NPDES permitting.

ARGUMENT

I

REQUIRING NPDES PERMITS FOR FOREST ROAD RUNOFF WILL INTERFERE WITH SUCCESSFUL STATE-SPECIFIC BEST MANAGEMENT PRACTICES

Extending the NPDES to cover forest road runoff is not necessary to protect water resources. Rainwater runoff from forest roads has been regulated for decades as non-point source pollution, minimized through time-tested "best management practices" (BMPs) at the state level, including drainage standards that prevent sediment from spilling into water bodies. *See* 33 U.S.C. § 1329; *see, e.g.*, Kevin Bold, *et al.*, *A Case Study of an Erosion Control Practice: The Broad-Based Dip 65* (2007) ("One [practice to control runoff] is the construction of cross drainage structures designed to efficiently drain water off the road prism in order to control the erosion potential of water collecting on the road surface.").[3]

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[3] Available at http://nrs.fs.fed.us/pubs/jrnl/2007/nrs_2007_bold_001.pdf (last visited Aug. 17, 2012).

The government and tree harvesters alike have found this state-based system of BMPs to be efficacious. A survey performed by researchers with the U.S. Forest Service demonstrates that, since 2000, at least 48 states have implemented their own individualized BMPs for controlling non-point source runoff associated with silviculture. Pamela J. Edwards & Gordon W. Stuart, *State Survey of Silviculture Nonpoint Source Programs: A Comparison of the 2000 Northeastern and National Results, N. J. Applied Forestry* 19(3), 122 (Sept. 2002).[4] There are now over 150 state laws nationwide that address non-point source pollution from silviculture, and compliance averages around 86%. *Id.* at 123-24.

Empirical evidence corroborates the reported success of BMPs—EPA does not list forestry among the leading sources of pollution to lakes, estuaries, or wetlands, due to the effectiveness of BMP programs:

> Much of forestry's success in pollution control is attributable to its early (beginning about 1972) and continued use of BMPs and compliance monitoring, and its recent emphasis on education and training. Although many states have similar BMP practices, development of BMPs at the state level has allowed states more ownership and support for their implementation, improved compliance, avoided a one-size-fits-all approach, fostered more creativity and flexibility, and addressed local conditions.

Id. at 126.

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[4] Available at http://nrs.fs.fed.us/pubs/jrnl/2002/ne_2002_edwards_001.pdf (last visited Aug. 17, 2012).

Pertinent to this case, Oregon has its own policies for safeguarding against pollution that might occur as a result of harvesting trees. Those laws include Oregon's Forest Practices Act, Or. Rev. Stat. § 527.610, *et seq.*, under which the Oregon Board of Forestry has promulgated water protection rules, Or. Admin. R. 629-635-0000, *et seq.* And those rules establish practices which place high priority on the preservation of water quality. *See, e.g.*, Or. Admin. R. 629-635-0100(7)(a) ("The protection goal for water quality . . . is to ensure through the described forest practices that, to the maximum extent practicable, non-point source discharges of pollutants resulting from forest operations do not impair the achievement and maintenance of the water quality standards.").

Forcing all forest roads, wherever located, to come under the same NPDES permitting program would unsettle the regulatory systems already in place in Oregon and other states, and could lead to negative consequences as a result of imposing a uniform regulatory scheme on non-uniform timber harvesting conditions among the states.

II

REQUIRING NPDES PERMITS FOR FOREST ROADS WILL CREATE TREMENDOUS COSTS AND DELAY

A. Including Forest Roads in the NPDES Will Result in a Significant Increase in the Number of NPDES Applications

If, despite the proven success of BMPs, this Court determines that forest road runoff must come within the ambit of the NPDES, then EPA will be forced to develop a permitting program for rainwater on forest

roads. *See* 33 U.S.C. § 1342. That program could be developed on a per-harvest, per-landowner, or per-discharge basis. But no matter how it is structured, it will mean that the Amici and millions of forest land owners and operators across the nation will face new, possibly insurmountable, regulatory obstacles, including unprecedented delay in the permitting process caused by a massive increase in the number of new permits that will be required.

1. Per Harvest

According to Forest Resources of the United States, there are 423 million acres of private forest land in the United States, controlled by about 11 million owners. W. Brad Smith *et al.*, *Forest Resources of the United States, 2007*, at 20 (United States Forest Serv. 2009).[5] Over 90% of those owners are individuals or unincorporated entities. *Id.* Those individuals and small businesses control about 62% of all private forest land, amounting to approximately 264 million acres nationwide. *Id.* Of those 264 million acres, 58% are used for commercial timber harvesting. *Id.* That means there are about 150 million acres of family-owned forest land in the United States used for tree harvesting.

Assuming that an average tree harvest encompasses 200 acres, and that each harvest would require access to forest roads having some form of drainage system, there are 750,000 (150 million divided by 200) potential tree harvest sites for which an NPDES permit may be necessary.

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[5] Available at http://www.fs.fed.us/nrs/pubs/gtr/gtr_wo78.pdf (last visited Aug. 17, 2012).

2. Per Landowner

Alternatively, NPDES permitting could be required on a per-landowner basis. A recent report summarizing the U.S. Forest Service's National Woodland Owner Survey shows that 46% of family forest land owners harvested or removed trees from some or all of their land between 2002 and 2006. *See* Brett J. Butler, *Family Forest Owners of the United States*, 2006, at 21 (U.S. Forest Serv. 2008).[6] If those owners continue to use their land for tree harvesting, and each tree harvest requires access to forest roads having some form of water conveyance, then there are about 5-6 million (roughly half of 11 million) forest land owners who will be required to obtain an NPDES permit if forest road runoff is covered under that program.

3. Per Discharge

Yet even predicting the impact of NPDES permitting on a per-harvest or per-landowner basis fails to paint the full picture. The impact could be analyzed in terms of the number of potential rainwater conveyances for which specific effluent limitations may have to be established as part of the NPDES permitting process. *See*, 33 U.S.C. § 1311(e) ("Effluent limitations . . . shall be applied to all point sources of discharge of pollutants . . . ."). If the ratio of one mile of forest road per square mile of forest land is used as a national average, then there are approximately

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[6] Available at http://nrs.fs.fed.us/pubs/gtr/gtr_nrs27.pdf (last visited Aug. 17, 2012).

264 million miles of forest roads on private forest land.[7] Again, assuming an average ratio of one water conveyance per mile of road, the estimated total number of conveyances requiring an NPDES permit would be 264 million.

4. Summary

Construing the NPDES to cover forest road runoff would result in an unprecedented increase in NPDES permit applications. Each state would be significantly affected, and at a national level, the Amici estimate that a forest road NPDES program would create at least an additional 750,000 permit applications, based on the number of tree harvests, 5 million permit applications, based on the number of affected landowners, or 264 million new point source discharges requiring permits. Cumulatively, such a program would place a crushing burden on the owners and operators that would be subject to it, as well substantially expand the NPDES program well beyond its current bounds, without express direction from Congress.

B. Including Forest Roads in the NPDES Will Result in Skyrocketing Costs and Intolerable Delay for Timber Harvesters

Imposing an NPDES permitting obligation for forest roads would overwhelm EPA and make it nearly impossible for forest land owners to obtain needed permits in a timely manner. The Amici estimate that

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[7] This is probably a conservative estimate. According to informal survey data gathered from the members of Amicus California Forestry Association, there are approximately 6 miles of forest road per square mile of forest land in California.

there are approximately 400,000 NPDES permits currently being administered by EPA, based on agency data made available to the public. *See* EPA, *Protecting the Nation's Waters Through Effective NPDES Permits: A Strategic Plan 1* (2001).[8] As outlined above, the number of new NPDES permits required *for forest roads alone* would exceed the total number of all NPDES permits currently administered.

The costs imposed by all of those new permits would be great. As this Court noted in 2006, the cost required at that time to obtain similar "dredge and fill" permits was already staggering at $271,596 for an individual permit, and $28,915 for a nationwide permit, not counting costs of mitigation or design changes. *Rapanos*, 547 U.S. at 721 (plurality opinion).

In terms of the costs that would be caused by delay, a worthwhile lesson can be drawn from EPA's experience in issuing a general rainwater discharge permit for shipping vessels, which was the direct result of litigation. *See Nw. Envtl. Advocates v. EPA*, No. C 03-05760 SI, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal., Mar. 30, 2005). EPA needed over two years to create that program, which has a much smaller scope than a program covering forest road runoff would have.[9] How much time would the agency need to put together a

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[8] Available at http://www.epa.gov/npdes/pubs/strategicplan.pdf (last visited Aug. 17, 2012).

[9] For a history of the development of EPA's vessel discharge program, visit http://cfpub.epa.gov/npdes/vessels/background.cfm (last visited Aug. 17, 2012). EPA estimates that approximately 70,000 total vessels will be affected by the vessel discharge permit program.

permitting program for over 250 million potential discharging sources on forest roads?

One thing is certain: While the agency struggled to produce a new permitting program, forest road owners and operators would be put in an impossible position—continue with business as usual and run the risk of becoming a defendant in a Clean Water Act citizen suit, or stop using forest roads and abandon their livelihoods.

CONCLUSION

The Amici respectfully request that this Court reverse the Ninth Circuit's opinion, which held that rainwater running off of forest roads must be treated as point source pollution under the NPDES. The Silviculture Rule exempting forest road runoff from inclusion in the NPDES sensibly excludes non-point source discharges from a permitting regime designed to control point source discharges of pollutants. Bringing forest roads under the NPDES would lead to a substantial increase in the number of permit applications that the government would have to process, while EPA does not have a program in place that could accommodate such an increase. Finally, extending the NPDES to cover forest road runoff would probably result in little environmental improvement, yet it would create an ungainly regulatory scheme that would disrupt successful state-tailored water quality programs which are already being enforced.

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Respectfully submitted,

M. REED HOPPER
Counsel of Record
DAMIEN M. SCHIFF
DANIEL A. HIMEBAUGH
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: mrh@pacificlegal.org
E-mail: dms@pacificlegal.org
E-mail: dah@pacificlegal.org

Counsel for Amici Curiae